

FILE COPY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1940.

No.  21

SOUTHERN RAILWAY COMPANY, *Petitioner,*

v.

ETHEL PAINTER, ADMINISTRATRIX OF THE ESTATE OF
GEOFFREY L. PAINTER, DECEASED, *Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUP-
PORT THEREOF.**

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PETITION.

Petitioner prays this Court to review on writ of certiorari a judgment of the United States Circuit Court of Appeals for the Eighth Circuit, in the case there entitled *Southern Railway Company, a Corporation, Appellant, v. Ethel Painter, Administratrix of Geoffrey L. Painter, Deceased, Appellee*, No. 11,794, rendered on the 10th day of January, 1941, (R. 97) and based upon a written opinion by that court rendered on the same date (R. 78-94), which judgment af-

firmed an injunctional order issued by the District Court of the United States for the Eastern District of Missouri, Eastern Division (in an action for damages for wrongful death there pending under the Federal Employers' Liability Act), restraining petitioner from enforcing an injunction against respondent issued at petitioner's instance by a state court of Tennessee, from which state court injunction respondent did not appeal, and mandatorily commanding and directing petitioner to dismiss and set at naught its said suit in the Tennessee court.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

On August 31, 1939, respondent, a resident of Knox County, Tennessee, and administratrix of her deceased husband's estate by appointment of the Probate Court of that County and State, filed an action at law against petitioner, in the United States District Court for the Eastern District of Missouri, Eastern Division, to recover damages under the Federal Employers' Liability Act (35 Stat. 65-66, 45 U. S. C. 51-59) for the alleged wrongful death of her intestate on February 3, 1939, at Bulls Gap, Madison County, North Carolina, while he was employed by petitioner as a fireman on an interstate run between Tennessee and North Carolina. (R. 2, 3.)

To an amended complaint filed on March 8, 1940 (R. 7), petitioner answered (R. 10), raising issues as to negligence, contributory negligence and assumption of risk.

Thereafter, on May 27, 1940, the Chancery Court of Knox County, Tennessee, in a suit brought by petitioner against respondent (R. 26), having therein jurisdiction of the person of respondent, both individually and in her representative capacity, by personal service of process upon her (R. 19), enjoined respondent under the laws of Tennessee, individually and as a Tennessee administratrix, from further prosecuting and maintaining her said action against petitioner in the United States District Court for the Eastern District of Missouri, and from instituting any other suit on

her alleged cause of action, except in the State courts of either Knox County, Tennessee, or Madison County, North Carolina, or in the United States District Courts for either the Eastern District of Tennessee at Knoxville or the Western District of North Carolina at Asheville. (R. 33.)

The Tennessee court based its injunction on general grounds of equity, that for respondent, a resident and probate court appointee of Tennessee, to avoid bringing her Liability Act suit in either the state or federal courts in Tennessee, the state of residence, or in either the state or federal courts of North Carolina, where the cause of action arose, but to go to the distant jurisdiction of Missouri and there sue petitioner in the federal district court, when all the witnesses lived in western North Carolina or eastern Tennessee, would be inequitable, harassing and oppressive, and would work an unjust and inequitable hardship on petitioner. (R. 26-36.)

Respondent did not appeal from the injunction issued by the Tennessee court. Instead, she thereupon, on June 21, 1940, filed, in her action at law pending in the United States District Court for the Eastern District of Missouri, a supplemental equitable complaint, setting out the proceedings had and the judgment rendered against her in the equity suit in the Tennessee court, and thereupon moved for a temporary injunction against petitioner. (R. 14-37.)

On July 10, 1940, upon hearing solely upon respondent's said sworn supplemental complaint and motion for temporary injunction, the District Court of the United States for the Eastern District of Missouri, Eastern Division, issued what it designated as a "Writ of Preliminary Injunction," but which, without limitation of time, broadly enjoined petitioner from interfering in any way with the liberty of respondent in prosecuting her said action in that court, from interfering in any way with that court's jurisdiction in the case, from further prosecuting petitioner's said equity suit in the Chancery Court of Knox County, Tennessee, and from taking any except dismissal proceedings therein. (R. 51-54, 73-76.)

This injunction order went even further and mandatorily and unconditionally commanded and directed petitioner forthwith to dismiss and set at naught its chancery suit in the Tennessee court. (R. 53, 75.) In its terms, this part of the injunction was final, not preliminary or interlocutory, in effect.

From the said injunction petitioner appealed, with supersedeas, under Section 129 of the Judicial Code as amended, 28 U. S. C. 227, to the United States Circuit Court of Appeals for the Eighth Circuit. (R. 1, 55.)

On January 10, 1941, that court affirmed the decree of injunction issued by the District Court. (R. 94.) The opinion of the Circuit Court of Appeals is not yet reported but appears in the record, pages 78-94. In the opinion, the court recognized that it was dealing with important questions of conflict between state and federal courts and it recognized that its decision was squarely in conflict with the decision of the Circuit Court of Appeals for the Second Circuit, in a case on all fours with the present case, *Bryant v. Atlantic Coast Line R. Co.*, 92 F. (2d) 569. (R. 91.)

The Circuit Court of Appeals held that the Tennessee court was without right, power, authority or jurisdiction to enjoin respondent from prosecuting suit for damages in the United States District Court for the Eastern District of Missouri; that the decree of the Tennessee court was not binding on respondent, and that federal courts are not required by the Constitution of the United States to give full faith and credit to such a decree; that the District Court had the right, power, authority and jurisdiction to issue its injunction restraining and enjoining petitioner from prosecuting or maintaining its chancery suit in Knox County, Tennessee, and directing petitioner to dismiss that suit; that the District Court was not deprived of power and jurisdiction to issue its injunction by Section 265 of the Judicial Code (28 U. S. C. 379), which expressly prohibits federal courts from enjoining proceedings in state courts, except in bankruptcy matters; and that the decree of the Tennessee

court was not merely a personal decree against respondent, restraining her personally from doing an inequitable, oppressive and harassing act, but that the decree actually and legally enjoined proceedings in the federal court.

JURISDICTION.

The date of the judgment sought to be reviewed is January 10, 1941.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 28 U. S. C. 347.

THE QUESTIONS PRESENTED.

1. Whether the Chancery Court of Knox County, Tennessee, having jurisdiction of the person of respondent, had the right, power, authority and jurisdiction, in an equity suit brought by petitioner, to enjoin respondent, a resident of Knox County, Tennessee, and acting as administratrix by appointment of the Knox County Probate Court, from prosecuting an action at law to recover damages under the Federal Employers' Liability Act for the death of her deceased husband in the District Court of the United States for the Eastern District of Missouri, the fatal accident having happened in North Carolina, and both the respondent and her intestate being residents of Knox County, Tennessee.

2. Whether the decree of the Chancery Court of Knox County, Tennessee, is binding upon respondent, both individually and in her representative capacity, until set aside or reversed; and whether the District Court was required to give full faith and credit to such decree under Article IV, Sec. 1, of the Constitution of the United States.

3. Whether the District Court, on a supplemental equitable complaint filed in an action at law there under the Federal Employers' Liability Act, had the right, power, authority and jurisdiction to issue an injunction against peti-

tioner, restraining and enjoining it from prosecuting or maintaining its chancery suit in Knox County, Tennessee, and ordering and directing petitioner to dismiss its said chancery suit.

4. Whether Section 265 of the Judicial Code (28 U. S. C. 379), as construed by this Court, deprived the District Court of the right, power, authority and jurisdiction to issue its interlocutory injunction. Section 265 provides:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

5. Whether the Tennessee decree actually and legally enjoined proceedings in the federal court, or whether its decree was a mere personal decree against respondent, issued by the Tennessee court against one of its own citizens, restraining her personally from doing an inequitable, oppressive and harassing act.

REASONS RELIED ON FOR GRANTING THE WRIT.

1. The decision and opinion of the Circuit Court of Appeals for the Eighth Circuit in this case is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit on the same matter in *Bryant v. Atlantic Coast Line R. Co.*, 92 F. (2d) 569, a decision by L. Hand, Swan, and Augustus N. Hand, Circuit Judges, Judge L. Hand writing the opinion.

In the *Bryant Case*, Bryant was a resident of Virginia injured in Virginia while employed by the railroad in interstate commerce. The witnesses to the accident lived in Virginia. Instead of bringing his suit in Virginia, either in state or federal courts, he sued the railroad, under the Federal Employers' Liability Act, in the District Court of the United States for the Southern District of New York, where the railroad was also doing business. The railroad then

sued Bryant in equity in the Virginia state court and secured injunction restraining him from prosecuting further his action in the federal District Court in New York. Bryant then applied to the District Court in New York for injunction restraining the railroad from prosecuting further its Virginia injunction proceeding. The District Court denied the injunction and on Bryant's appeal the Court of Appeals for the Second Circuit affirmed, not on any question of discretion in denying an interlocutory injunction, but on the fundamental ground that the District Court in New York was without power, in view of Section 265 of the Judicial Code, to restrain the Atlantic Coast Line from prosecuting its equity suit in the Virginia courts.

That case is on all fours with ours. The decisions are diametrically in conflict on the important questions of conflict between state and federal courts. The opinion of the Court of Appeals for the Eighth Circuit below distinctly recognized that conflict. (R. 91.)

The decision below, here sought to be reviewed, based itself largely on the decision by the same court in the earlier case of *Chicago, M. & St. P. Ry. Co. v. Schendel*, 292 Fed. 326, and upon the construction which it had put in the *Schendel Case* on this Court's decision in *Kline v. Burke Const. Co.*, 260 U. S. 226.

In the *Bryant Case* the Court of Appeals for the Second Circuit considered the *Schendel Case*, recognized the conflict between that case and its holding, but held that the Court of Appeals for the Eighth Circuit had in the *Schendel Case* misapplied this Court's decision in *Kline v. Burke Const. Co.*

The court below, in the decision here sought to be reviewed (like the Court of Appeals for the Second Circuit in the *Bryant Case*) did not deal with any question of discretion or abuse of discretion by the District Court in granting interlocutory injunction. It grappled with and decided the fundamental questions of power and of conflict between federal and state courts. It held that the Tennessee court

was without power to entertain the equity suit there and that the District Court in Missouri had the power, in spite of Section 265 of the Judicial Code, to enjoin petitioner from farther prosecuting its equity suit in the Tennessee court and to command petitioner to dismiss that suit.

Other decisions in other circuit and district courts are likewise in conflict on the questions presented. *Ex Parte Crandall* (C. C. A. 7th), 53 F. (2d) 969, is in harmony with the decision by the Court of Appeals for the Second Circuit in the *Bryant Case*. Likewise in harmony with the *Bryant Case* is *Baltimore & Ohio R. Co. v. Bole* (D. C., W. Va.), 31 F. Supp. 221. The cases of *Southern Railway Co. v. Cochran* (C. C. A. 6th), 56 F. (2d) 1019; *Chesapeake & Ohio Ry. Co. v. Vigor* (C. C. A. 6th), 90 F. (2d) 7; *Rader v. Baltimore & Ohio R. Co.* (C. C. A. 7th), 108 F. (2d) 980, tend to support the decision of the court below.

2. The court below has decided important questions of federal law which have not been, but should be, settled by this Court.

3. The court below has decided said important federal questions in a way probably in conflict with applicable decisions of this Court, particularly *Kline v. Burke Const. Co.*, 260 U. S. 226, and certainly in conflict with the construction put on that case by the Court of Appeals for the Second Circuit in the *Bryant Case*.

4. The questions presented are grave questions of public importance involving conflict of jurisdiction between state and federal courts and, it is submitted, the decision below is in conflict with the modern trend of decision of this Court which is to leave the state courts free from interference by the federal courts in the determination of questions of general law or equity.

5. The court below has so far departed from the accepted and usual course of judicial proceedings, and so far sanc-

tioned such a departure by the District Court below, as to call for an exercise of this Court's power of supervision.

Wherefore, it is respectfully submitted that this petition for writ of certiorari should be granted.

SOUTHERN RAILWAY COMPANY,
Petitioner.

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BRIEF IN SUPPORT OF PETITION.

OPINIONS BELOW.

The Trial Judge in the District Court filed no opinion. He made findings of fact and stated conclusions of law which follow the allegations of the supplemental complaint. (R. 42-49.) The opinion of the Circuit Court of Appeals below is not yet reported. It appears in the record, pages 78 to 94.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on January 10, 1941. (R. 94.) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. 347.

STATEMENT AND QUESTIONS PRESENTED.

The statement of the matter involved and the questions presented are set out in the petition.

SPECIFICATION OF ERRORS.

The specification of points relied upon on the appeal to the Court of Appeals below, upon which the questions presented in the foregoing petition arise, will be found on pages 67 to 71 of the record.

ARGUMENT.

If the writ is granted petitioner expects to file a brief on the merits presenting all the reasons and authorities for its assertion that the decision below is erroneous and that the conflicting decision of the Circuit Court of Appeals for the Second Circuit in the *Bryant Case*, *supra*, is correct. The present brief is addressed only to showing that the case is a proper one for exercise of the discretion to grant the writ of certiorari.

I.

The Conflict Between Circuit Courts of Appeals.

As stated in the petition, the court below, in its opinion (R. 86-90), rested its decision heavily on its previous holding in *Chicago, M. & St. P. Ry. Co. v. Schendel*, 292 Fed. 326, and on the construction which it had put in the *Schendel Case* on this Court's decision in *Kline v. Burke Const. Co.*, 260 U. S. 226.

Of the holding by the Court of Appeals for the Eighth Circuit in the *Schendel Case*, the Court of Appeals for the Second Circuit, in *Bryant v. Atlantic Coast Line R. Co.*, 92 F. (2d) 569, 571, said:

"Nor can we agree with *Chicago, M. & St. Paul Ry. Co. v. Schendel*, 292 F. 326 (C. C. A. 8), where the facts were on all fours with those at bar. The court's theory there was that, as the federal court had first acquired

'jurisdiction of the subject-matter of the cause of action' (292 F. 326, at pages 332-334), it might protect that jurisdiction. In so holding the court assumed to follow *Kline v. Burke Construction Company*, 260 U. S. 226, 43 S. Ct. 79, 67 L. Ed. 226, 24 A. L. R. 1077, but with great deference it does not seem to us that it did so. An action in personam is indeed in some sense a 'subject-matter' before the court where it is pending; conceivably its pendency should stay a later action in the court of another state, just as it often does—when both courts are of the same state—under the plea of *lis alio pendens*. But the very purpose of *Kline v. Burke Construction Company*, *supra*, was to reaffirm—for it was an old doctrine—that two actions in personam upon the same cause of action may go on *pari passu* in different jurisdictions. That is in effect the situation at bar; because although of course the action and the suit are not upon the cause of action, the plaintiff's present demand to be free to prosecute the action involves exactly the same cause of suit as the Virginia suit. This would at once have been apparent had it been pressed by bill in equity, as, strictly speaking, it should have been; for the Virginia suit was based upon the notion that the plaintiff was using inequitably a legal right—the right of action under the Federal Employers' Liability Act—just as he might use a legal title to land inequitably. The plaintiff's motion strove to supersede that suit by drawing the same issue before the federal court; and both controversies were suits in personam which did not concern a *res* susceptible of custody. Both may therefore go along side by side."

In the opinion below the Court of Appeals for the Eighth Circuit recognized that its holding was in direct conflict with the holding of the Second Circuit in the *Bryant Case*. It said (R. 91):

"In *Bryant v. Atlantic Coast Line R. Co.*, 92 F. 2d 569, the Circuit Court of Appeals for the Second Circuit disagreed with the conclusions of this court in *Railroad v. Schendel*, *supra*, and held that a federal court which had taken jurisdiction of an action for damages under the Federal Employers' Liability Act could not enjoin enforcement of a decree issued by a state court

to prevent the plaintiff from proceeding with trial of his cause in the federal court. The state court, there a court of Virginia, was held 'obviously' to have jurisdiction, and it was said that in the court's view, *Kline v. Construction Company*, 260 U. S. 226, had been misconstrued in *Railroad v. Schendel*, *supra*. It appears to have been the view of the Second Circuit that since the state injunction suit was in personam and the federal damage suit and the proceedings ancillary thereto were also in personam, they were suits that could proceed simultaneously and *pari passu*. The foregoing discussion of *Railroad v. Schendel* indicates our points of disagreement."

The opinion of the court below (R. 89) shows that the decision by the Court of Appeals for the Second Circuit in the *Bryant Case* was pressed upon the court below and that it was urged to distinguish or overrule its decision in the *Schendel Case*. However, it squarely reaffirmed the *Schendel Case*, refused to distinguish it (although on the merits we shall undertake to show that it was distinguishable) and held that, "The principles announced in *Railroad v. Schendel*, *supra*, are controlling in the present case." (R. 90.)

The conflict between circuits is diametrical. Whether the *Bryant Case* be correct or the decision below correct, such a conflict ought to be resolved by decision here and is, alone, sufficient reason for granting the writ. Rule 38, par. 5(b), of this Court. See *Helvering v. Janney*, decided December 9, 1940, 85 L. ed. Adv. 127, 128; *United States v. Falcone*, decided December 9, 1940, 85 L. ed. Adv. 143, 144; *United States v. Stewart*, decided November 12, 1940, 85 L. ed. Adv. 25, 26; *J. E. Riley Invest. Co. v. Commissioner of Int. Rev.*, decided November 12, 1940, 85 L. ed. adv. 35.

II.

The Questions Presented are Important Questions of Federal Law and Grave Questions of Conflict Between State and Federal Court Jurisdictions.

The general equity jurisdiction of courts of a state to control its residents and, in a proper case, to enjoin such residents from maintaining legal proceedings in foreign jurisdictions, even though otherwise they have legal right to bring such proceedings, is generally recognized. *Cole v. Cunningham*, 133 U. S. 107, 124; *Roberts Federal Liabilities of Carriers*, 2d Ed., vol. 2, sec. 962, and cases cited; *High on Injunctions*, sec. 106; *Pomeroy on Equity Jurisdiction*, 3d Ed., vol. 4, sec. 1360, and vol. 6, sec. 670; *Louisville & N. R. Co. v. Ragan*, 172 Tenn. 593, 113 S. W. (2d) 743; *Ex Parte Crandall* (C. C. A. 7th), 53 F. (2d) 969, certiorari denied 285 U. S. 540; *Bryant v. Atlantic Coast Line R. Co.* (C. C. A. 2nd), 92 F. (2d) 569; *Baltimore & Ohio R. Co. v. Bole* (D. C., W. Va.), 31 F. Supp. 221.

This general equity jurisdiction of the state courts would seem to apply with special force where the resident so enjoined is a personal representative appointed under state law to administer an estate, and accountable to the probate courts of the state in administering such state office.

In many cases it has been held that the state court has such jurisdiction and power to restrain a personal representative, created by the state, from prosecuting in a foreign state court jurisdiction an action under the Federal Employers' Liability Act. An important question here raised is whether the Liability Act has the effect to take that jurisdiction away from the state courts, where the personal representative, instead of suing in a foreign state court, elects to prosecute the concurrent remedy of suing in a federal district court sitting in the foreign state. The court below held that the Liability Act has that effect. The Court of Appeals for the Second Circuit held in the *Bryant Case* that it had no such effect.

The Liability Act, 35 Stat. 65-66, 45 U. S. C. 51-59, contains no language which in terms purports to take this general equity jurisdiction away from the state courts. The Act creates a right of action for wrongful death which did not exist at common law, but it creates no federal officer to enforce that right. It vests the right in the "personal representative" of the deceased, who is an officer of state creation and presumably intended to be subject to state law in his action as such officer. It gives concurrent jurisdiction to the federal district courts and to the state courts over such actions, although it expresses an intention to prefer the state court jurisdiction to the federal court jurisdiction because it expressly provides that no action under the Act brought in a state court shall be removed to the federal courts.

The jurisdictional and venue section of the Act, as amended by the Act of August 11, 1939, 53 Stat. 1404, 45 U. S. C. 56, provides:

"No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

"Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, and no cause arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

The court below held that this section confers an absolute, federal legal right on respondent to sue petitioner under the Act in the federal district court in any district in which petitioner is doing business, regardless of distance from the state of respondent's residence and of the residence of the witnesses, and regardless of the inequity and hardship on

petitioner of such proceeding, and that it thereby took away from the courts of Tennessee the general equity jurisdiction to restrain a Tennessee administratrix which otherwise would plainly exist.

By reason of this provision of the Federal Employers' Liability Act, the court below held that the decree of the Tennessee court enjoining respondent, a Tennessee administratrix, from prosecuting her action in the federal District Court in Missouri was void and hence that it was not entitled to full faith and credit, and that the District Court had power to enjoin its enforcement. "We think," said the court below, "that the nature of the dual system compels the conclusion that a state court which assumes to enjoin such an action in a federal court does so in excess of its jurisdiction and renders a decree which is void in so far as it affects proceedings in the federal court. Such a void decree is not entitled to full faith and credit, and its enforcement may be enjoined:" (R. 90.)

In an exactly like case, the Circuit Court of Appeals for the Second Circuit, in the *Bryant Case*, held that the Virginia court injunction was valid and that the federal District Court in New York was without power to enjoin the Virginia injunction.

Not only did the court below give this effect to the Federal Employers' Liability Act. It decided an equally important federal question when it held that the District Court had the power to enjoin petitioner from proceeding to enforce the Tennessee injunction and to require it to dismiss the equity case in Tennessee, in spite of the inhibition of Section 265 of the Judicial Code, hereinbefore quoted in the petition p. 6. The Court of Appeals for the Second Circuit in the *Bryant Case* decided that question the other way.

Obviously the questions presented are important and present grave considerations as to conflict between state and federal courts.

In an analogous situation this Court, in the very recent case of *Beal v. Missouri Pacific R. R. Corp'n in Nebraska*, decided January 20, 1941, granted certiorari to review the

question of the equity jurisdiction of a federal district court to enjoin a criminal proceeding in the state courts, saying "the question being of public importance since it involves the appropriate relationship of the federal to the state courts." And in that case this Court reversed the Circuit Court of Appeals for the Eighth Circuit, which had affirmed the District Court's exercise of such jurisdiction.

The questions here presented have not been, but we think obviously should be settled by this Court. Rule 38, par. 5(b), of this Court. *Beal et al. v. Missouri Pacific R. R. Corp'n in Nebraska, supra.*

III.

The Decision Below Decides Federal Questions in a Way Probably in Conflict With Applicable Decisions of This Court.

That the decision below is probably not in accord with the decision of this Court in *Kline v. Burke Const. Co.*, 260 U. S. 226, seems apparent from the language used in the *Bryant Case* by the Court of Appeals for the Second Circuit in commenting on that case and on the reliance placed on it by the Court of Appeals for the Eighth Circuit in the *Schendel Case*. See *supra*, pp. 12-13.

We believe the decision below to be contrary to the modern trend of the decisions of this Court toward a stricter application of the terms of the inhibition of Section 265 of the Judicial Code. *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U. S. 4, 8-9; *Hill v. Martin*, 296 U. S. 393; *Riehle v. Margolies*, 279 U. S. 218.

We believe the decision below to be also contrary to the modern trend of decisions beginning with *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, under which federal courts refrain from interfering with, and are bound by, decisions of the courts of the several states on matters of general law or equity, not regulated by federal statutes. See *Jackson v. New York Life Ins. Co.*, 304 U. S. 261; *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202; *Cities Service Oil Co. v. Dunlop*, 308 U. S. 208, 212; *Russell v. Todd*, 309 U. S. 280, 287; *Thompson v. Magnolia Petroleum Co.*, 309 U. S. 478, 484.

IV.

The Fact That the Decision Sought to be Reviewed is Technically Non-Final, in That It was the Affirmance of an Interlocutory Injunction, is no Reason Here for Denial of the Writ.

We have already shown that the decision below was not concerned with the question of discretion or abuse of discretion which usually arises on appeals from interlocutory injunctions. It went to the fundamental questions of power, jurisdiction and conflict. It held that the State court was without the power to enjoin and that the District Court had the power to enjoin.

This Court's jurisdiction to review cases in the Circuit Courts of Appeals under Section 240(a) of the Judicial Code, is not, however, confined to review of final decrees of those courts but extends also to interlocutory decrees. *Toledo Co. v. Computing Co.*, 261 U. S. 399, 418. And see the discussion in Robertson & Kirkham's *Jurisdiction of the Supreme Court of the United States* (1936), pp. 201-204 and 623-628, and cases cited.

In *American Construction Co. v. Jacksonville, etc., Ry. Co.*, 148 U. S. 372, it was held that certiorari to review a decree of a Circuit Court of Appeals on appeal from an interlocutory order will issue to prevent extraordinary inconvenience and embarrassment, or where the question of law involved is novel and important, and where the position of the petitioner is one which, if correct, renders the decision of the court below wholly void.

We have shown that the questions involved in the decision below are novel and important.

If petitioner is correct, and if the Court of Appeals for the Second Circuit was correct in the *Bryant Case*, then the District Court below was wholly without power to issue the interlocutory injunction and, if so, the decision sought to be reviewed is wholly void.

Moreover, the nature of this case is such that unless petitioner can secure review of the decision below at this stage, all of petitioner's rights which the Tennessee court sought

by its injunction to protect, will be lost by the time a final judgment is rendered by the federal courts in the liability action. The questions here sought to be raised would then have become moot.

If the decision below be not reviewed at this stage, by this Court, it stands as an effective, if not technical, finality. Petitioner will be restrained from taking any proceeding to enforce its Tennessee injunction. Indeed it is mandatorily ordered to dismiss its Tennessee equity suit, whatever the Tennessee court may think of such action. Petitioner will be forced to trial of the liability action in the distant District Court in Missouri. It will incur all the hardship and expense of taking witnesses from their homes and places of work in Tennessee and North Carolina to Missouri, with consequent disruption of their regular work, upon which the Tennessee Court based its injunction.

If the respondent then secures a final judgment in the liability action, all of the hardship, inequity and expense considered by the Tennessee court will have already been suffered, with no possibility of recovery, and no remedy by review of such final judgment would be available to petitioner on the questions here presented, however erroneous the decision now sought to be reviewed may be.

It is, therefore, respectfully submitted that the petition for certiorari should be granted.

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